

**NO. PD-0244-19**

**IN THE  
COURT OF CRIMINAL APPEALS  
OF TEXAS**

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**THE STATE OF TEXAS**

**APPELLANT**

**v.**

**ERLINDA LUJAN**

**APPELLEE**

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**APPELLEE'S BRIEF ON  
PETITION FOR DISCRETIONARY REVIEW**

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**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS  
NO. 08-17-00035-CR**

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**TRIALCOURT:**

243<sup>rd</sup> District Court, Judge Luis Aguilar, presiding

**COURT OF APPEALS:**

Eighth Court of Appeals, Honorable Chief Justice Ann Crawford McClure, Justice Yvonne T. Rodriguez, and Justice Gina M. Palafox

## **TABLE OF CONTENTS**

IDENTITY OF PARTIES, COUNSEL AND TRIAL JUDGE .....	ii
INDEX OF AUTHORITIES .....	iv
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS AND PROCEEDINGS .....	3
RESPONSE TO STATE’S GROUND FOR REVIEW .....	7
SUMMARY OF APPELLEE’S ARGUMENTS .....	7
ARGUMENT .....	7
CONCLUSION AND PRAYER .....	21
CERTIFICATE OF COMPLIANCE .....	22
CERTIFICATE OF SERVICE .....	22

## **INDEX OF AUTHORITIES**

### **STATE CASES**

<i>Arguellez v. State</i> , 409 S.W. 3d 657 (Tex. Crim. App. 2013).....	18
<i>Ex Parte Bagley</i> , 509 S.W.2d 332 (Tex. Crim. App. 1974).....	11
<i>Bible v. State</i> , 162 S.W.3d 234 (Tex. Crim. App. 2005).....	10
<i>Burruss v. State</i> , 20 S.W.3d 179 (Tex. App.--Texarkana 2000, pet. ref'd).....	11
<i>Carter v. State</i> , 309 S.W.3d 31 (Tex. Crim. App. 2010).....	10
<i>Cotten v. State</i> , No. 08-13-00051-CR, 2013 WL 6405511 (Tex. App.—El Paso, Dec. 4, 2013, pet. ref'd).....	12
<i>Crain v. State</i> , 315 SW 3d 43 (Tex. Crim. App. 2010).....	17
<i>Creager v. State</i> , 952 S.W.2d 852 (Tex. Crim. App. 1997).....	11
<i>Davidson v. State</i> , 25 S.W.3d 183 (Tex. Crim. App.2000).....	9
<i>Dunn v. State</i> , 721 S.W.2d 325, 338 (Tex. Crim. App. 1986).....	10, 11
<i>Flemming v. State</i> , 949 S.W.2d 876 (Tex. App.-Houston [14th Dist.] 1997, no pet.).....	11
<i>Franks v. State</i> , 712 S.W.2d 858 (Tex. App.-Houston [1st Dist.] 1986, pet. ref'd).....	12
<i>Gonzales v. State</i> , 369 S.W.3d 851 (Tex. Crim. App. 2012).....	18
<i>Hayes v. State</i> , 05-11-00260-CR, 2013 WL 1614108 (Tex. App.-Dallas, Feb. 19, 2013, no pet).....	11
<i>Herrera v. State</i> , 241 S.W.3d 520 (Tex. Crim. App. 2007).....	9
<i>Jones v. State</i> , 119 S.W.3d 766 (Tex. Crim. App. 2003) (en banc).....	11

<i>Jones v. State</i> , 119 S.W.3d 766 (Tex. Crim. App. 2003).....	9
<i>Miller v. State</i> , 393 S.W.3d 255 (Tex. Crim. App. 2012).....	17
<i>State v. Duran</i> , 396 S.W.3d 563 (Tex. Crim. App. 2013).....	18
<i>State v. Mechler</i> , 153 S.W.3d 435 (Tex. Crim. App. 2005).....	15
<i>Stiles v. State</i> , 927 S.W.2d 723 (Tex. App.—Waco 1996, no pet.).....	12
<i>Tucker v. State</i> , 369 S.W.3d 179 (Tex. Crim. App. 2012).....	18

## **FEDERAL CASES**

<i>Davis v. United States</i> , 114 S.Ct. 2350, 512 U.S. 452, 462, 129 L.Ed.2d 362 (1994).....	20
<i>Dickerson v. United States</i> , 530 U.S. 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).....	9
<i>Escobedo v. Illinois</i> , 378 U.S. 478 84 s. Ct. 1758, 122 L.Ed.2d 977 (1964).....	19
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	9
<i>Missouri v. Seibert</i> , 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).....	10
<i>Moran v. Burbine</i> , 475 U.S. 412, 425, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).....	19
<i>Oregon v. Elstad</i> 470 U.S. 298, 316, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).....	10
<i>Wyrick v. Fields</i> , 459 U.S. 42, 103 S.Ct. 384, 74 L.Ed.2d 214 (1982).....	20

## **STATUTES AND RULES**

<i>Tex. Code Crim. Proc. Ann.</i> art. 38.22, § 3(a).....	21
<i>Texas Code Crim. Proc. Ann.</i> art. 38.22, 3(e).....	9

**STATEMENT OF FACTS**  
**AND PROCEEDINGS IN TRIAL COURT AND COURT OF APPEALS**

On September 27, 2016, Erlinda Lujan was arrested in connection with the Anthony Trejo investigation and transported to El Paso Police Department headquarters. (RR2:6-7, 28). Over the following seven to eight hours, three separate recordings were made of interrogations of Ms. Lujan by detectives. (RR2:9, 28, RR2:20).<sup>1</sup>

After her arrest, Ms. Lujan was placed in an interrogation room and questioned by Detective Ochoa and Detective Camacho. (RR2:6-9, 28). Detective Ochoa read her *Miranda* warnings at 4:29 p.m. (RR2:10, 16, 28, 50); (SX1B:4-5). When he asked her if she understood and waived the rights, Lujan replied “right” and led by Ochoa, the interrogation began. (SX1B:5).

Ms. Lujan denied killing Mr. Trejo. She stated “Sean” and “Filero” beat him. Ms. Lujan helped Mr. Trejo and fed him after he was beaten. (SX1B:6-8). Later, she heard on the streets that he had been killed. (SX1B:8). Sean and Filero made her help them dispose of black bags that held the body. She told the officers where they drove with the bags. (SX1B:8-12).

As the detectives pressed Ms. Lujan about who was present, Ms. Lujan stated “I can’t snitch them out...I cannot do this...can’t I just tell you where the

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<sup>1</sup> References to Ms. Lujan’s statements are to the transcripts of the video and audio statements. Statement One (SX1A) was a video recording at the El Paso Police Department (transcript: SX1B). Statement Two (SX2A) was an audio recording made on an iPad in a police automobile. (transcript: SX2B). Statement Three (SX3A) was a video recording at the Police Department (transcript: SX3B).

body's at?" (SX1B:13). The detective again questioned Ms. Lujan about who was present and Ms. Lujan stated "I don't want to do all of this." She stated "...I know where the body is... I don't care if I go to jail for this... I don't care, I just want it done". Detective Ochoa asked Ms. Lujan "[y]ou want us to take you where the body is at?" and she stated "I just want to get this over with. I'll take you wherever you want". (SX1B:14). The detectives exited the room and when they returned, Detective Ochoa told Ms. Lujan they would drive her to the area where the body was left. (SX1B:15). Detective Ochoa ended the interrogation with the statement, ".....when we come back, we can continue, if you like, okay". (SX1B:15). The video recorded statement began at 4:27 p.m. and ended at 4:42 p.m.

The detectives retrieved an iPad, turned on its audio recording capacity before they got in the unmarked police car and placed Ms. Lujan in the back seat. (RR2:12-13). Detective Camacho sat with Lujan in the back of the car with the iPad between them. (RR2:12-13). The audio recording began at approximately 4:48 p.m. and lasted approximately three hours (RR2:11, 14-15, 30-32). Ms. Lujan was not given *Miranda* warnings or otherwise reminded of her rights during the time she was in the car. (RR2:16). Detective Camacho led the questioning in the car while Ochoa drove. (SX2B:2).

During the second interview, Ms. Lujan denied killing Mr. Trejo but admitted going to dispose the body at the insistence of Sean & Filero. (SX2B:19,

66-70). In addition, Ms. Lujan was questioned about other offenses including the kidnapping and release of “Isaac”, Ms. Lujan’s past employment as an “escort,” and her prior drug use and trafficking. (RR2:15, 22, 34-35).

Ms. Lujan was unable to provide the exact location of the body and she was driven back to the police department. The audio statement ended at 7:50 p.m. (RR2:36); (SX2B:175).

The detectives placed Ms. Lujan in a cell and then returned her to the same interview room where statement one was taken. (RR2:18, 36-38). The video recording of Statement Three began at approximately 10:00 p.m. (RR2:17-19, 37-39). Camacho told Lujan “[t]his is a continuation of our interview that we had taken before,” and Detective Ochoa stated “[i]n the continuation of our interview, okay, I’m gonna read you the following”. He then provided *Miranda* warnings. (RR2:19-20); (SX3B:2-3). Statement Three covered the same subjects as Statement Two. (RR2:20-22).

Ms. Lujan filed a motion to suppress the statements and a hearing was held on the motion where Detective Ochoa and Detective Camacho testified. (RR2).

Detective Camacho and Detective Ochoa testified that Ms. Lujan was pleading and demanding that they let her take them to the burial site and that leaving the police department interview room was at her request. (RR2:10-11, 29, 31, 50).



Detective Camacho testified that he thought the statement in the car was a continuation of the first interrogation. (RR2:33). He admitted that the detectives did not tell Lujan “[l]et’s go out to the car and we’ll continue the conversation”, (RR2:11), but rather told her the interrogation was going to continue when they got back to the office. (RR2:11).

Detective Camacho testified that the move was no different than a bathroom or smoke break but also stated that he does not give three hour smoke and bathroom breaks. (RR2: 33, 42). He stated there were situations, like a couple minute bathroom break, where he felt he did not need to re-*Mirandize* suspects. (RR2:42). He stated those circumstances were different than the situation with Ms. Lujan where they moved her to a car and then interrogated her for three hours. (RR2:42).

Appellee did not contest the admissibility of Statement One. (RR2:27). The trial court entered an order denying suppression of the first statement and granting suppression of the second and third statements. (CR:64). The trial court issued findings of Fact and Conclusions of Law including the following:

19. Based on the demeanor of the witnesses and totality of circumstances, the Court finds that --a) Detective Ochoa told Lujan that supervisors wanted them to get back soon; and b) Detective Ochoa stated "when we come back, we can continue, if you like"--so that Ms. Lujan would believe that although any statements made at the interview room at police headquarters would be used against her, any statements made on the way to look for the body would not.

20. Based on the demeanor of the witnesses and totality of circumstances, the Court finds that because Ms. Lujan had denied involvement in Mr. Trejo's murder during Statement One, the Detectives moved Lujan from the interview room to their vehicle to induce her to admit to being involved in the killing of Mr. Trejo.
21. Based on the demeanor and totality of circumstances and conflicting statements, the Court finds Statement Two was not a continuation of or the same interview as Statement One. Further, that Detective Camacho's testimony that he believed Statement Two was a continuation of Statement One, similar to what happens in a bathroom break, is not credible.
27. The interrogation of Ms. Lujan in the car was different from the first interrogation in that several additional crimes and subjects were discussed. Ms. Lujan was interrogated about the disposal of Anthony Trejo's body and his death, but also about kidnappings, drug use and distribution, car theft, prostitution and other issues.
30. Based on the demeanor of the witnesses and totality of circumstances, the Court finds that by—a) telling Ms. Lujan that they could continue the statement when they returned; b) moving Ms. Lujan from the interview room to the car; c) having Detective Camacho lead the interrogation in the car; d) talking about other cases; and e) failing to remind Ms. Lujan that the Miranda warnings of Statement One were still in effect—Statement Two was not a continuation of Statement One and the Miranda warnings given in Statement One were no longer effective during Statement Two.
30. Based on the demeanor of the witnesses and totality of circumstances, the Court finds that by—a) telling Ms. Lujan that they could continue the statement when they returned; b) moving Ms. Lujan from the interview room to the car; c) having Detective Ochoa lead the interrogation in the car; d) talking about other cases; e) failing to remind Ms. Lujan that the Miranda warnings of Statement One were still in effect; and f) failing to read Ms. Lujan Miranda warnings in the car—the Detectives deliberately sought to circumvent Ms. Lujan's Miranda protections.
31. Based on the demeanor of the witnesses and totality of circumstances, the Court finds that because Ms. Lujan had denied involvement in Mr. Trejo's murder during Statement One, the Detectives moved Ms. Lujan from the interview room to their vehicle in a deliberate attempt to circumvent Ms.

Lujan's Miranda protections.

.....

8. Based on the Courts findings of fact stated above, Statement Two is inadmissible as it was not a continuation of Statement One, the Miranda warnings reflected in Statement One were not effective in Statement Two and Statement Two was taken in violation of Ms. Lujan's Miranda protections. (CR:87-92).

The Eighth Court affirmed the suppression of the second statement, holding that the trial court did not abuse its discretion in finding the second interview was not a continuation of the first interview and the prior Miranda/38.22 warnings did not apply.

The Eighth Court reversed the trial court's suppression of the third statement on the ground that the State did not have notice that the suppression motion was based on the "two-step" interrogation technique (question first, warn later) at the suppression hearing. The issue was remanded to the trial court to allow the trial court to re-hear the suppression issue with the State on notice of the two-step technique as a ground for suppression of the third statement.

This appeal concerns the Court of Appeals' decision regarding the suppression of the second statement.

## **RESPONSE TO STATE'S GROUND FOR REVIEW**

**The Eighth Court of Appeals correctly sustained the trial court's finding that, due to the circumstances, the second interview was not a continuation of the first interview and was properly excluded for failure to provide *Miranda*/38.22 warnings.**

## **SUMMARY OF APELLEE'S ARGUMENTS**

The totality of the circumstances and the acts of the detectives rendered the initially provided *Miranda* warnings in the first interrogation ineffective and the second interrogation was not a continuation of the first. When Ms. Lujan stated she did not kill Mr. Trejo and indicated that she did not want to identify the others involved or further discuss the facts but only wanted to tell them where Mr. Trejo's body was located, the detectives moved her from the interview room to the car. By telling her they could continue the interview once they returned to the interview room, the detectives signaled an end to the first interview. The totality of the circumstances and *Bible* factors support the Eighth Court's finding that the trial court did not err in suppressing the second statement because it was not a continuation of the first statement.

## **ARGUMENT**

The Eighth Court of Appeals correctly sustained the trial court's finding that, due to the circumstances, the second statement was not a continuation of the

first statement and was properly excluded for failure to provide *Miranda* and 38.22 warnings.

Although the time period between the warnings in the first interview and the beginning of the second interview was short, the entire sequence followed by the detectives seems to have been aimed at diluting the efficacy of the previously given warning. After receiving the *Miranda* warnings during the first interview, Ms. Lujan denied involvement in Mr. Trejo's death and identified two of the parties responsible. She admitted helping dispose the body. When the detectives questioned Ms. Lujan further about the parties involved, she stated she did not want to "snitch them out" and instead asked that she be allowed to tell them where the body was taken. The detectives had reached an impasse where Ms. Lujan would not admit she killed Mr. Trejo and was not willing to "snitch out" the other involved parties and further discuss the facts of the case. Detective Ochoa then asked if she wanted to take them to the burial site and she agreed. The detective signaled an end to the interview by claiming the interview could "continue" when they returned from the drive to look for the body. Ms. Lujan was quickly moved out of the interrogation room to the police car where the detectives did not re-*Mirandize* her and did not remind her of the previously provided warnings. The totality of circumstances establishes that the second interview was not a mere continuation of the first.

*Miranda* warnings safeguard a person's constitutional privilege against self-incrimination during a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Herrera v. State*, 241 S.W.3d 520, 525 (Tex. Crim. App. 2007). Custodial interrogation is inherently coercive, blurs the line between voluntary and involuntary statements, and thus heightens the risk that a suspect's Fifth Amendment privilege against self-incrimination will not be observed. *Dickerson v. United States*, 530 U.S. 428, 435, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). Voluntariness "encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice." *Miranda*, 384 U.S. at 464-65. To minimize that risk, a failure to give *Miranda* warnings and obtain a waiver of rights before custodial questioning generally results in forfeiture of the use of any statement obtained during that interrogation. *Jones v. State*, 119 S.W.3d 766, 772 (Tex. Crim. App. 2003) (en banc).

Texas Code of Criminal Procedure 38.22 overlays *Miranda* with additional requirements including that the warnings must be on an oral or video recording and that the requirement must be strictly construed. *Texas Code Crim. Proc. Ann. Art. 38.22, 3(e)*; *Davidson v. State*, 25 S.W.3d 183, 185 (Tex. Crim. App. 2000).

Where "none of the earmarks of coercion" in a particular factual situation are present and the officer's failure to warn was merely an "oversight", generally no

*Miranda* violation occurs. *Oregon v. Elstad* 470 U.S. 298, 316, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). On the other hand, a police strategy adapted to undermine the efficacy of *Miranda* warnings, likely would result in exclusion of a statement secured by use of the strategy. *See Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643(2004). For instance, when assessing a statement purportedly obtained by a question first, warn later strategy, Texas courts initially determine whether the two-step interrogation involved deliberate police misconduct to avoid *Miranda* protections. *Carter v. State*, 309 S.W.3d 31, 38 (Tex. Crim. App. 2010).

The failure to give *Miranda* warnings before an interview is periodically excused when warnings were given in a previous interrogation and the previously given warnings remain effective. The second interview is essentially a continuation of the previous one. *Id*; *Bible v. State*, 162 S.W.3d 234, 242 (Tex. Crim. App. 2005).

Whether an interview is a continuation of an earlier interview is determined from a totality of the circumstances. *See Dunn v. State*, 721 S.W.2d 325, 338 (Tex. Crim. App. 1986). Circumstances and facts to consider include : (1) the passage of time, (2) whether the interrogations were conducted by different persons, (3) whether the interrogations related to different offenses, and (4) whether the defendant is reminded of the earlier warnings, whether she remembered those

warnings, and whether she wished to waive or invoke them. *Bible*, 162 S.W.3d at 242 (discussing *Jones v. State*, 119 S.W. at 773 n.13 (Tex. Crim. App. 2003)). The *Bible* factors are not exclusive.

No circumstance is necessarily dispositive, but rather is evaluated as part of the totality. However, it is instructive that most of the cases finding two interrogation sessions were a continuous interrogation include circumstances where the suspect was previously warned and the officers reminded the suspect she had been previously warned or alternatively, new or new but “imperfect” warnings were given in the second interrogation. (*see Bible*, 162 S.W.3d at 241-42 (Tex. Crim. App. 2005) (reminded of several earlier warnings and imperfect warnings given during subsequent interrogation); *Dunn v. State*, 721 S.W.2d at 338 (Tex. Crim. App. 1986) (warned earlier, warned before written statement, warned after written statement and then tape recorder turned on and another confession given), *abrogated on other grounds Creager v. State*, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997) ; *Ex parte Bagley*, 509 S.W.2d 332, 336-38 (Tex. Crim. App. 1974) (previous warnings and new imperfect warnings); *Burruss v. State*, 20 S.W.3d 179, 188 (Tex. App.-Texarkana 2000, pet. ref'd) (reminded of previous warnings in second interview); *Hayes v. State*, 05-11-00260-CR, 2013 WL 1614108 (Tex. App.-Dallas, Feb. 19, 2013, no pet) (reminded of previous warnings); *Flemming v. State*, 949 S.W.2d 876, 880 (Tex. App.-Houston [14th Dist.] 1997, no pet.)



(reminded of previous warnings); *Stiles v. State*, 927 S.W.2d 723, 729-730 (Tex. App.—Waco 1996, no pet.); *Franks v. State*, 712 S.W.2d 858, 861 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd) (reminded of previous warnings); *Cotten v. State*, No. 08-13-00051-CR, 2013 WL 6405511 (Tex. App.—El Paso, Dec. 4, 2013, pet. ref'd)(reminded of previous warning).

In the present case, the detectives did not re-warn, remind or otherwise ensure that Ms. Lujan knew she retained her rights. The Eighth Court of Appeals found that the failure to remind or re-warn favored a finding that the second interview was not a continuation of the first. The Eighth Court determined that the short passage of time favored “continuation”. The Court found that the same detectives were involved in both interviews but that one detective predominated the first and the other detective dominated the second interview. The Court determined this factor was neutral. The second interview involved several different offenses but due to the sheer length of time of the second interview, it was not surprising that other cases would be discussed and found that this factor was neutral. In addition, the Court took into consideration that the interviews were in different locations. Finally, the Court held that the detective’s statement that the interview could “continue” when they returned from driving to find the body, was a clear indication that the first interview had ended and the second interview was not a continuation. The language the detective used, in common

parlance, signaled the end of something with the prospect that it could be continued. The Eighth Court correctly evaluated the totality of the circumstances and ruled that the trial court did not abuse its discretion in determining the second interview was not a continuation of the first.

The State claims the detective's vague and ambiguous act or statement regarding when the interview would continue, should not impact the admissibility of the statement. The State maintains this would be bad policy, as it would require an officer to continually evaluate whether re-administration of warnings are called for after off-hand statements and would undermine the ease and clarity of *Miranda's* application. The State's policy argument ignores the simplicity inherent in merely re-warning Ms. Lujan once the Detectives began their drive to the burial scene, or simply reminding her that she had previously been warned. As evidenced by the many cases cited above, officers are well aware of their ability to re-warn and in fact the necessity. In fact, Detective Camacho, at the beginning of the third interview, told Ms. Lujan "[t]his is a continuation of our interview that we had taken before,". In addition, Detective Ochoa, stated "[i]n the continuation of our interview, okay, I'm gonna read you the following". He then provided *Miranda* warnings. (RR2:19-20); (SX3B:2-3).

In addition, in making its policy argument, the State seeks to isolate the detective's "off-hand" statement and to have it viewed in a vacuum so that it can

argue that an officer cannot be held hostage to vague and ambiguous statements which might undermine the ease of *Miranda* application.

The State fails to evaluate the totality of the circumstances and seeks to have the trial court's findings disregarded. Rather than merely making an ambiguous and vague off-hand comment, the detective made a statement which was clearly designed, as found by the trial court, to be a strategy to evade *Miranda*. The totality of the circumstances include that Ms. Lujan was moved after denying she killed Mr. Trejo, stated she did not want to "snitch" on the other parties, no longer wanted to discuss the facts and only wanted to tell them where the body was. The detective stated clearly and unambiguously that the interrogation would continue once they returned from the drive to find the body. She was moved to a totally different location for the second interview. Different detectives led the separate interviews. When they returned to the interview room, she was reminded that they were continuing the earlier interview, and she was warned again.

Detective Camacho and Detective Ochoa testified that Ms. Lujan was moved to the car at her insistence, not upon their request. The detectives in their testimony and the State, in its argument, apparently believed that when Ms. Lujan stated she wanted to "tell" them where the body was, she was actually saying she wanted to "take them to" or "show" them where the body was.

Detective Camacho testified that he thought the interrogation in the car was a continuation of the first interview, and that *Miranda* warnings were not warranted because this change was similar to a smoke or bathroom break.

The trial court heard the testimony of Detectives Ochoa and Camacho and the videos. Unlike the trial court, an appellate court "cannot weigh on appeal ... the intonation and demeanor of the witnesses preceding the testimony in issue." *State v. Mechler*, 153 S.W.3d 435 (2005). The State appears to believe the trial court was incapable of evaluating and weighing the evidence and testimony in the case. Thus, rather than trusting the trial court could view the video interviews, listen to the detectives' testimony, consider the circumstances at hand and reach a reasonable conclusion as to why the detectives moved Ms. Lujan from the station, why she was told the interview would continue when they returned, and what she understood, the State argues in its Statement of Facts and Argument that the trial court's findings were mere speculation. Pursuant to this standard, neither a trial court nor a jury would ever be capable of rendering a guilty verdict requiring assessment of a defendant's intentional or reckless culpable mental state unless he confessed his knowledge or intent. Such a standard is unreasonable.

Issues such as an officer's deliberateness rely heavily upon the officer's demeanor and testimonial evidence at a motion to suppress hearing. *Carter v. State*, 309 S.W.3d 31, 40 (Tex. Crim. App. 2010) ("when the trial court, after

having the chance to observe the officer's testimony, makes an explicit factual finding regarding the deliberateness of the strategy, a deferential standard of review must be employed..." *Id.* at 40-42.

The trial court found:

Based on the demeanor of the witnesses and totality of circumstances, the Court finds that --a) Detective Ochoa told Lujan that supervisors wanted them to get back soon; and b) Detective Ochoa stated "when we come back, we can continue, if you like"--so that Ms. Lujan would believe that although any statements made at the interview room at police headquarters would be used against her, any statements made on the way to look for the body would not.

Based on the demeanor of the witnesses and totality of circumstances, the Court finds that because Ms. Lujan had denied involvement in Mr. Trejo's murder during Statement One, the Detectives moved Lujan from the interview room to their vehicle to induce her to admit to being involved in the killing of Mr. Trejo.

Based on the demeanor and totality of circumstances and conflicting statements, the Court finds Statement Two was not a continuation of or the same interview as Statement One. Further, that Detective Camacho's testimony that he believed Statement Two was a continuation of Statement One, similar to what happens in a bathroom break, is not credible.

The interrogation of Ms. Lujan in the car was different from the first interrogation in that several additional crimes and subjects were discussed. Ms. Lujan was interrogated about the disposal of Anthony Trejo's body and his death, but also about kidnappings, drug use and distribution, car theft, prostitution and other issues.

Based on the demeanor of the witnesses and totality of circumstances, the Court finds that by—a) telling Ms. Lujan that they could continue the statement when they returned; b) moving Ms. Lujan from the interview room to the car; c) having Detective Camacho lead the interrogation in the car; d) talking about other cases; and e) failing to remind Ms. Lujan that the Miranda warnings of Statement One were still in effect—Statement Two

was not a continuation of Statement One and the Miranda warnings given in Statement One were no longer effective during Statement Two.

Based on the demeanor of the witnesses and totality of circumstances, the Court finds that by—a) telling Ms. Lujan that they could continue the statement when they returned; b) moving Ms. Lujan from the interview room to the car; c) having Detective Ochoa lead the interrogation in the car; d) talking about other cases; e) failing to remind Ms. Lujan that the Miranda warnings of Statement One were still in effect; and f) failing to read Ms. Lujan Miranda warnings in the car—the Detectives deliberately sought to circumvent Ms. Lujan's Miranda protections.

Based on the demeanor of the witnesses and totality of circumstances, the Court finds that because Ms. Lujan had denied involvement in Mr. Trejo's murder during Statement One, the Detectives moved Ms. Lujan from the interview room to their vehicle in a deliberate attempt to circumvent Ms. Lujan's Miranda protections.

Based on the Courts findings of fact stated above, Statement Two is inadmissible as it was not a continuation of Statement One, the Miranda warnings reflected in Statement One were not effective in Statement Two and Statement Two was taken in violation of Ms. Lujan's Miranda protections.

In reviewing a trial judge's ruling on a motion to suppress a suspect's statement, an abuse of discretion standard is used. *Crain v. State*, 315 SW 3d 43, 48 (Tex. Crim. App. 2010). Appellate courts give almost total deference to the trial judge's determination of historical facts. When there are factual disputes regarding testimony or the contents of a recording, the trial court's findings of historical fact are afforded almost total deference. *Miller v. State*, 393 S.W.3d 255, 263 (Tex. Crim. App. 2012). If video evidence supports a trial court's conclusion, the court of appeals should view video evidence in the light most favorable to the trial

court's ruling and assume that the trial court made implicit findings that support its ruling. *Tucker v. State*, 369 S.W.3d 179, 185 (Tex. Crim. App. 2012). Only when evidence is conclusive, such as with indisputable visual evidence, may a trial court finding inconsistent with that conclusive evidence be disregarded as unsupported by the record. *Id.* Further, only when the resolution of a mixed question of law and fact do not depend on evaluation of credibility and demeanor does a court apply a de novo standard of review to the trial court's ruling. *Arguellez v. State*, 409 S.W. 3d at 662. *Gonzales*, 369 S.W.3d at 854 (Tex. Crim. App. 2012). The evidence is viewed in the light most favorable to the trial judge's ruling-whether the motion is granted or denied. The winning side is afforded the "strongest legitimate view of the evidence" as well as all reasonable inferences that can be derived from it. *State v. Duran*, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013).

The Eighth Court, in accordance with the standards of review, gave the required weight to the trial court's evaluation of witness credibility and demeanor and totality of circumstances and its ruling should be upheld.

In support of its policy argument, the State cites several United States Supreme Court cases. It cites *Burbine* in support of its claim that suppression in this case would lead to "muddying Miranda's otherwise relatively clear waters". *Moran v. Burbine*, 475 U.S. 412, 425, 106 S.Ct.1135, 89 L.Ed.2d 410 (1986). *Burbine* reiterates *Miranda's* requirement that a relinquishment of the rights be a

“product of a free and deliberate choice rather than intimidation, coercion, or deception”. In addition, a totality of the circumstances surrounding the interrogation must reveal both an uncoerced choice and the requisite level of comprehension before a court may properly conclude that the *Miranda* rights have been waived. In *Burbine*, the appellate court reversed the trial court’s denial of the motion to suppress the suspect’s statement due to a detective’s failure to tell the suspect his attorney had attempted to invoke the right to counsel. The Supreme Court reversed, finding that the court of appeals could not so easily disregard the trial court’s findings and rule the officers acted deliberately and recklessly. Further, failure to tell the suspect of the call “could not possibly affect a suspect’s decision to waive his *Miranda* rights unless he were at least aware of the incident”. Because the suspect knew nothing about the attorney’s contact, the failure to inform him of the telephone call was not the kind of “trick[ery]” that could vitiate the validity of a *Miranda* waiver. On the other hand, telling a suspect to his face that his attorney did not want to talk to him, would impact a suspect’s decision to waive his rights. See *Escobedo v. Illinois*, 378 U.S. 478, 481 (1964) (excluding confession where police incorrectly told the suspect that his lawyer “‘didn’t want to see’ him”). This latter case is more comparable to Ms. Lujan’s case. That the interview in the car was not a continuation of the interview in the station, was



made clearly and directly to Ms. Lujan by the detective's statement as they were leaving the interview room.

*Davis* concerns a suspect's ambiguous request for an attorney and how that might impact what an officer does next. It does not address when an officer's "ambiguous" statement impacts a suspect's decision to waive his rights. The Supreme Court held that a suspect's request for an attorney must be unambiguous and an equivocal request won't suffice although good police practice calls for the interviewing officers to clarify whether or not the suspect actually wants an attorney in those circumstances. *Davis v. United States*, 114 S.Ct. 2350, 512 U.S. 452, 462, 129 L.Ed.2d 362, (1994).

In *Wyrick*, while represented by counsel, the suspect agreed to take a polygraph exam. He was provided *Miranda* warnings and after being informed that the polygraph showed deception, he confessed. The Supreme Court reversed the lower court because it decided the case in a vacuum and did not examine the totality of the circumstances. Before the polygraph began, the suspect received *Miranda* warnings. "Merely disconnecting the polygraph equipment could not remove this knowledge" from his mind. *Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct. 384, 74 L.Ed.2d 214 (1982). This is a far cry from Ms. Lujan's circumstances where she was moved from the station to a patrol car and told the interview could

continue when they returned to the station, thus signaling the end to the first interview.

Thus, none of the Supreme Court cases support the State's policy argument that requiring the detectives to warn or remind Ms. Lujan was unjustified in this case.

In addition to *Miranda* protections, Article 38.22, section 3(a) regulates the admissibility of an oral statement of an accused. *Tex. Code Crim. Proc. Ann.* art. 38.22, § 3(a) (Vernon Supp.2004-05). No oral statement of an accused is admissible unless during the recording the accused is given the 38.22 warnings. The courts are to strictly construe the provision. *Id.* § (3)(e); *Davidson v. State*, 25 S.W.3d 183, 185 (Tex. Crim. App.2000) (noting that by its plain language section 3(e) requires strict compliance with all portions of section 3(a)).

For these reasons, the Court of Appeals for the Eighth District of Texas correctly sustained the trial court's finding that the *Miranda* warnings given in Statement One were no longer effective for Statement Two and that Statement Two was not a continuation and should be suppressed.

### **CONCLUSION AND PRAYER**

For these reasons, Appellee requests that the Eighth Court's holding that the trial court's orders suppressing Statement Two be upheld and sustained.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 9.4**

This brief filed in compliance with the type-volume limitations of Rule 9.4. The brief contains 5,353 words, and this brief complies with the typeface requirements of 9.4(e) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point.

**CERTIFICATE OF SERVICE**

I certify that a true copy of the Appellant's Brief was served in accordance with rule 9.5 of the Texas Rules of Appellate Procedure on the State of Texas as follows:

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